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4 UNITED STATES DISTRICT COURT  
5 WESTERN DISTRICT OF WASHINGTON  
6 AT SEATTLE

7 HYDRO-BLOK USA LLC, et al.,  
8 Plaintiffs,

9 v.

10 WEDI CORP.,

11 Defendant,

12 v.

13 HYDROBLOK INTERNATIONAL  
14 LTD.,

15 Counter-defendant.

C15-671 TSZ

ORDER

16 WEDI CORP.,

17 Plaintiff,

18 v.

19 BRIAN WRIGHT, et al.,

20 Defendants.

21 THIS MATTER comes before the Court on a motion for summary judgment,  
22 docket no. 176, brought by Brian Wright (“Wright”), Sound Product Sales L.L.C.  
23 (“Sound Product”), Hydro-Blok USA LLC (“Hydro-Blok”), and Hydroblok International,  
Ltd. (“H-International”). Having reviewed all papers filed in support of, and in  
opposition to, the motion, including supplemental briefing permitted by a Minute Order  
issued on February 6, 2019, docket no. 240, the Court enters the following Order.

1 **Background**

2 wedi Corp. (“wedi”) is an Illinois corporation that distributes construction  
3 materials and sealants for use in bathroom systems, including showers. See Am. Compl.  
4 at ¶ 1 (docket no. 17). From June 2008 until September 2014, Wright and/or Sound  
5 Product, in which Wright is the sole member, served as a sales agent for wedi within  
6 certain states, including Washington. See Order at 2-3 (Case No. C18-636 TSZ, docket  
7 no. 72). H-International is a Canadian company of which Ken Koch is the sole  
8 proprietor. Id. at 3. In 2014, H-International and Hydro-Blok, in which Wright is the  
9 sole member, id. at 2-3, began distributing products that compete with the materials sold  
10 by wedi.

11 In December 2014, wedi accused Hydro-Blok of infringing United States Patent  
12 No. 5,961,900 (the “’900 Patent”), which discloses a method of manufacturing composite  
13 board. See Ex. B to Compl. (Case No. C15-615 TSZ, docket no. 1-6). After an exchange  
14 of further correspondence on the subject, Hydro-Blok and H-International commenced  
15 action against wedi and its parent company, wedi GmbH, a German corporation, seeking  
16 a declaratory judgment of non-infringement as to the ’900 Patent. See Compl. & Am.  
17 Compl. (Case No. C15-615 TSZ, docket nos. 1 & 7). After wedi GmbH filed a  
18 declaration indicating that it has no ownership interest in and is not a licensee under the  
19 ’900 Patent, Hydro-Blok and H-International dismissed their claims against wedi GmbH.  
20 See Lohmann Decl. (Case No. C15-615 TSZ, docket no. 31-1); Notice of Voluntary  
21 Dismissal (Case No. C15-615 TSZ, docket no. 32). Similarly, after wedi represented in a  
22 declaration that it likewise does not own and is not a licensee under the ’900 Patent,  
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1 Hydro-Blok and H-International indicated that they did not oppose wedi's motion to  
2 dismiss the declaratory judgment action, see Plas.' Resp. (Case No. C15-615 TSZ, docket  
3 no. 50), and the Court dismissed Hydro-Blok's and H-International's complaint without  
4 prejudice. Order (Case No. C15-615 TSZ, docket no. 54).

5 Meanwhile, in April 2015, wedi had initiated this suit against Wright, Sound  
6 Product, and Hydro-Blok, asserting breach of contract and a variety of other claims. See  
7 Compl. (docket no. 1). wedi made related allegations against H-International in  
8 counterclaims filed in the declaratory judgment action. See Answer & Counterclaims  
9 (Case No. C15-615 TSZ, docket no. 19). In December 2015, the Court consolidated the  
10 declaratory judgment action into this matter. See Order (docket no. 37). Wright, Sound  
11 Product, and Hydro-Blok eventually brought counterclaims against wedi for tortious  
12 interference with prospective economic advantage and abuse of process. Answer &  
13 Counterclaims (docket no. 50). wedi's motion for summary judgment, seeking to dismiss  
14 those counterclaims, was previously denied. Minute Order at ¶ 1 (docket no. 240).

15 Pursuant to agreements between wedi, Wright, and Sound Product, the parties  
16 were directed to arbitrate wedi's breach of contract, breach of fiduciary duty, civil  
17 conspiracy, and unjust enrichment claims against Wright and/or Sound Product. See  
18 Order (docket no. 26). The parties also arbitrated wedi's allegation that Wright violated  
19 Washington's Uniform Trade Secrets Act ("WUTSA"), which had been pleaded as a  
20 counterclaim, but only against H-International. See Am. Counterclaims at Count VII  
21 (docket no. 64). The arbitrator found against wedi and in favor of Wright and Sound  
22 Product on all claims other than breach of contract; on the contract claim, the arbitrator  
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1 awarded to wedi \$1.00 in nominal damages. See Order at 2 (docket no. 128); Order at 2  
2 (docket no. 111); Award (docket no. 101-3). The Court confirmed the arbitral award, as  
3 modified by the Court, entered partial judgment in favor of wedi and against Wright on  
4 the breach of contract claim in the amount of \$1.00, and dismissed with prejudice  
5 wedi's claims against Wright and/or Sound Product for breach of fiduciary duty, civil  
6 conspiracy, unjust enrichment, and violation of WUTSA. Orders (docket nos. 111 &  
7 128); Judgment (docket no. 129). No party timely filed a notice of appeal.

8 Wright, Sound Product, Hydro-Blok, and H-International subsequently sought  
9 partial summary judgment, and the Court further narrowed the claims remaining for trial.  
10 In May 2018, wedi's counterclaims against H-International for aiding and abetting  
11 Wright in breaching a fiduciary duty, civil conspiracy, and violation of WUTSA were  
12 dismissed with prejudice. See Order (docket no. 152). The claims and counterclaims  
13 asserted by wedi that are currently pending in this matter and that are the subject of the  
14 current motion for summary judgment, docket no. 176, are as follows:

<b>Claim or Counterclaim</b>	<b>Against</b>
Tortious Interference with Contract	H-International
Lanham Act	Wright, Hydro-Blok, and H-International
Consumer Protection Act	Wright, Hydro-Blok, and H-International
Tortious Interference with Prospective Advantage	Wright, Hydro-Blok, and H-International
Abuse of Process	Wright, Hydro-Blok, and Sound Product

21 Wright, Sound Product, Hydro-Blok, and H-International now seek summary  
22 judgment with regard to the balance of wedi's claims and counterclaims. Their earlier  
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1 motion for partial summary judgment also challenged wedi's tortious interference and  
2 abuse of process claims, but on different grounds than are raised in the motion now  
3 before the Court. See Order at 6-7 (docket no. 152). The Court denied those portions of  
4 the previous motion because Wright, Hydro-Blok, and H-International had not shown  
5 how the arbitrator's decision preempted wedi's tortious interference claims, and because  
6 Wright, Sound Product, and Hydro-Blok had not established that the fact wedi's abuse of  
7 process claim was asserted in a "counter-counterclaim," which is not among the types of  
8 pleadings enumerated in Federal Rule of Civil Procedure 7(a), formed an appropriate  
9 basis for summary judgment. Id. In the instant motion, the movants contend they are  
10 entitled to summary judgment on the ground that wedi cannot, with respect to each of its  
11 remaining claims, prove one or more elements on which it will bear the burden of proof  
12 at trial. The Court agrees as to the abuse of process and false advertising claims, but not  
13 with regard to the tortious inference claims.

#### 14 **Discussion**

##### 15 **A. Summary Judgment Standard**

16 The Court may grant summary judgment if no genuine dispute of material fact  
17 exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ.  
18 P. 56(a). The moving party bears the initial burden of demonstrating the absence of a  
19 genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). A  
20 fact is material if it might affect the outcome of the suit under the governing law.  
21 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). To survive a motion for  
22 summary judgment, the adverse party must present affirmative evidence, which "is to be  
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1 believed” and from which all “justifiable inferences” are to be favorably drawn, *id.* at  
2 255, 257, showing that a rational trier of fact could find for such party on matters as to  
3 which such party will bear the burden of proof at trial, *see Matsushita Elec. Indus. Co. v.*  
4 *Zenith Radio Corp.*, 475 U.S 574, 587 (1986); *see also Celotex*, 477 U.S. at 322.

5 **B. Abuse of Process**

6 In Washington, the elements of the tort known as “abuse of process” are as  
7 follows: (i) the existence of an ulterior purpose to accomplish an object not within the  
8 proper scope of the process, (ii) an act in the use of legal process not proper in the regular  
9 prosecution of the proceedings, and (iii) harm proximately caused by the abuse of  
10 process. *Bellevue Farm Owners Ass’n v. Stevens*, 198 Wn. App. 464, 477, 394 P.3d 1018  
11 (2017). The crucial inquiry is whether the judicial system’s process, after having been  
12 made available to secure the presence of the opposing party, has been misused to achieve  
13 another, inappropriate end. *See Mark v. Williams*, 45 Wn. App. 182, 192, 724 P.2d 428  
14 (1986). The mere institution of a legal proceeding, even with a malicious motive, does  
15 not constitute an abuse of process. *Vargas Ramirez v. United States*, 93 F. Supp. 3d  
16 1207, 1232 (W.D. Wash. 2015). Even the filing of a baseless or vexatious lawsuit is not  
17 misusing the process, and no liability attaches if nothing is done with the litigation “other  
18 than carrying it to its regular conclusion.” *Batten v. Abrams*, 28 Wn. App. 737, 749, 626  
19 P.2d 984 (1981).

20 To prove its abuse of process claim, wedi must establish that each entity against  
21 which it asserts such claim engaged in an act, **after** using legal process, “to accomplish  
22 an end not within the purview of the suit.” *Vargas Ramirez*, 93 F. Supp. 3d at 1232; *see*  
23

1 also Batten, 28 Wn. App. at 748 (the tort “goes to use of the process once it has been  
2 issued for an end for which it was not designed”). The acts about which wedi complains  
3 fall into two categories: (i) conduct related to the declaratory judgment action; and  
4 (ii) the assertion of an abuse of process counterclaim against wedi. With regard to the  
5 first basis, wedi attempts to lump “defendants” together, but the only entity against which  
6 wedi asserts its abuse of process claim that participated in the declaratory judgment  
7 action was Hydro-Blok. As to Hydro-Blok, wedi offers four reasons for alleging abuse of  
8 process: (i) Hydro-Blok brought the declaratory judgment action without knowing  
9 whether wedi or wedi GmbH owned the ’900 Patent; (ii) Hydro-Blok failed to ask in  
10 discovery whether wedi or wedi GmbH owned the ’900 Patent, instead requesting that  
11 they identify who has rights in the ’900 Patent; (iii) Hydro-Blok declined to dismiss the  
12 suit in advance of motion practice in the absence of a covenant from wedi not to sue; and  
13 (iv) as a result, wedi had to engage in motion practice, including the filing of a reply  
14 brief. See Pla.’s Resp. at 20 (docket no. 187).

15 Hydro-Blok undisputedly received a letter dated December 16, 2014, from wedi’s  
16 counsel that read:

17 wedi has been given reason to believe that . . . Hydro-Blok USA has begun  
18 offering for sale in the United States a composite board product made by a  
19 process that infringes wedi’s United States Patent no. 5,961,900 . . . in  
20 violation of 35 U.S.C. § 271(g).

21 Ex. B to Compl. (Case No. C15-615 TSZ, docket no. 1-6) (emphasis added). About a  
22 month later, on January 14, 2015, wedi’s attorney told Hydro-Blok’s lawyer:

23 If your clients contend that they are not liable for infringing wedi’s  
’900 patent, please respond by Friday of this week identifying (and  
explaining) the claim limitations of the ’900 patent they contend are not

1 satisfied. Please beware that **wedi is prepared to take all steps necessary**  
2 **to protect its patent rights** (e.g., file suit in federal court) if Hydro-Blok  
3 USA and Mr. Wright cannot show that the product at issue was made by a  
4 non-infringing process.

5 Ex. D to Compl. (Case No. C15-615 TSZ, docket no. 1-8) (emphasis added). On April 3,  
6 2015, wedi's counsel indicated:

7 This firm has been **retained by wedi Corporation** . . . to institute  
8 litigation, if necessary, against Bright Wright, Hydro-Blok USA LLC . . . ,  
9 Hydroblok International, Ltd. . . . , and possibly others, relating to the  
10 importation of, use, and offer to sell a composite wall board product . . .  
11 that is believed to infringe on **wedi's** United States Patent No. 5,961,900  
12 . . . in violation of 35 U.S.C. § 271(g).

13 Ex. E to Compl. (Case No. C15-615 TSZ, docket no. 1-9) (emphasis added). Given  
14 wedi's attorneys' repeated representations that wedi owned the '900 Patent and intended  
15 to take legal action to protect "its patent rights," Hydro-Blok was not, as a matter of law,  
16 required to independently investigate whether wedi owned or was a licensee under the  
17 '900 Patent before initiating the declaratory judgment action. Moreover, in asking wedi  
18 and wedi GmbH to identify the owners or licensees of the '900 Patent, refusing to dismiss  
19 the declaratory judgment action in the absence of a covenant not to sue, and waiting until  
20 after wedi and wedi GmbH declared under oath that they did not own and were not  
21 licensees under the '900 Patent to forego the litigation, Hydro-Blok did not, as a matter of  
22 law, engage in acts "to accomplish an end not within the purview of the suit." Rather,  
23 Hydro-Blok merely carried the litigation to "its regular conclusion," securing for itself  
some protection against wedi suing it in the future for infringement of the '900 Patent.

With regard to its second basis for asserting abuse of process, namely that Wright,  
Sound Product, and Hydro-Blok have themselves alleged abuse of process, wedi has not



1 described any act beyond the filing of a counterclaim that these parties have taken. Even  
2 if their abuse of process counterclaim is groundless, and even if they had a malicious  
3 motive for pursuing such counterclaim, wedi cannot, without proof of some form of  
4 extortive conduct on the part of Wright, Sound Product, and/or Hydro-Blok, respectively,  
5 establish an abuse of process claim. See Batten, 28 Wn. App. at 746 (indicating that the  
6 requisite “improper purpose” for an abuse of process claim “usually takes the form of  
7 coercion to obtain a collateral advantage, not properly involved in the proceeding itself”).  
8 wedi has not presented the type of affirmative evidence necessary to withstand summary  
9 judgment, and wedi’s abuse of process counter-counterclaim is DISMISSED with  
10 prejudice.

11 **C. False Advertising (Lanham Act and CPA)**

12 The law of false advertising falls within the broader concept of unfair competition.  
13 See 44 AM. JUR. PROOF OF FACTS 3d 1 at § I.A.1. (1997). wedi asserts its false  
14 advertising claim against Wright, Hydro-Blok, and H-International under both federal  
15 and state law, *i.e.*, the Lanham Act and Washington’s Consumer Protection Act,  
16 respectively. Under Section 43(a) of the Lanham Act,

17 [a]ny person who, on or in connection with any goods or services, or any  
18 container for goods, uses in commerce any . . . false or misleading  
description of fact, or false or misleading representation of fact, which--

19 . . . in commercial advertising or promotion, misrepresents the  
20 nature, characteristics, qualities, or geographic origin of his or her  
or another person’s goods, services, or commercial activities,

21 shall be liable in a civil action by any person who believes that he or she is  
22 or is likely to be damaged by such act.

1 15 U.S.C. § 1125(a)(1)(B).<sup>1</sup> Pursuant to Washington’s CPA,

2 [u]nfair methods of competition and unfair or deceptive acts or practices in  
3 the conduct of any trade or commerce are . . . declared unlawful.

4 RCW 19.86.020.<sup>2</sup>

5 Wright, Hydro-Blok, and H-International contend that they are entitled to  
6 summary judgment because wedi’s Lanham Act and CPA claims are based on non-  
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8  
9 <sup>1</sup> To establish liability under the Lanham Act, a plaintiff must prove that (1) the defendant made  
10 a false statement of fact about its own or the plaintiff’s product; (2) the statement was made in a  
11 commercial advertisement or promotion; (3) the statement actually deceived or had the tendency  
12 to deceive a substantial segment of its audience; (4) the deception was material; (5) the defendant  
13 caused the statement to enter interstate commerce; and (6) the plaintiff has been or is likely to be  
14 injured as a result of the statement, either by diversion of sales from the plaintiff to the defendant  
or a lessening of the plaintiff’s goodwill. *See Newcal Indus., Inc. v. Ikon Office Sol.*, 513 F.3d  
1038, 1052 (9th Cir. 2008). “To demonstrate falsity within the meaning of the Lanham Act, a  
plaintiff may show that the statement was literally false, either on its face or by necessary  
implication, or that the statement was literally true but likely to mislead or confuse consumers.”  
*Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir. 1997).

15 <sup>2</sup> To establish a violation of the CPA, a plaintiff must establish that (i) the defendant engaged in  
16 an unfair or deceptive act or practice; (ii) such act or practice occurred within a trade or business;  
17 (iii) such act or practice affected the public interest; (iv) the plaintiff suffered an injury to its  
18 business or property; and (v) a causal relationship exists between such injury and the unfair or  
19 deceptive act or practice. *See Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105  
Wn.2d 778, 785-93, 719 P.2d 531 (1986). Whether conduct constitutes an unfair or deceptive  
act or practice within the meaning of the CPA constitutes a question of law. *Robinson v. Avis*  
*Rent A Car Sys., Inc.*, 106 Wn. App. 104, 114, 22 P.3d 818 (2001). wedi does not accuse  
20 Wright, Hydro-Blok, and/or H-International of any *per se* unfair or deceptive act or practice, and  
21 thus, wedi must demonstrate that the acts or practices at issue are either unfair or deceptive under  
22 the criteria developed in Washington jurisprudence. *See Rush v. Blackburn*, 190 Wn. App. 945,  
962-63, 361 P.3d 217 (2015). A trade practice can be considered “unfair” if (i) it offends public  
policy, although not the letter of the law, or falls within “the penumbra of some common-law,  
statutory, or other established concept of unfairness”; (ii) it is “immoral, unethical, oppressive, or  
unscrupulous”; and/or (iii) it causes substantial injury to consumers, competitors, or other  
businesses. *Id.* An act can be “unfair” without being “deceptive.” *Id.* at 963. Conduct is  
“deceptive” if it involves a representation, omission, or practice that is “likely to mislead” a  
reasonable person and has “the capacity to deceive a substantial portion of the public.” *Id.*

1 actionable puffery or on statements that are not demonstrably false. wedi's false  
2 advertising claim is premised on the following statements:

- 3 i. "All HYDRO-BLOK™ products are IAPMO tested & certified"
- 4 ii. "Cutting of product is dust free and quick"
- 5 iii. "Environmentally friendly lightweight products with CFC-free  
6 XPS foam core"
- 7 iv. "100% WATERPROOF • HCFC-FREE XPS CLOSED-CELL  
8 FOAM CORE"
- 9 v. "What is HYDRO-BLOK? Put simply, it is the easiest, quickest and  
10 most user-friendly way to build a water-proof shower or tub  
11 surround at a price you can afford."
- 12 vi. "Introducing HYDRO-BLOK, the better, easier & more cost-  
13 effective way to build complete shower systems"
- 14 vii. "www.HydroBlok.com, we provide the most efficient, light-  
15 weighted [sic], 100% water-proof, tile-ready shower system, which  
16 can be installed within [sic] couple hours instead of days, by one  
17 person"
- 18 viii. "Speed and ease of installation for commercial applications can not  
19 [sic] be beat"
- 20 ix. "MODIFIED CEMENT COATING FOR MAXIMUM ADHESION  
21 OF TILE & STONE"
- 22 x. "When laid on a floor with your favourite tile or stone, it is  
23 commercially rated."
- xi. "HYDRO-BLOK™ The BETTER Shower System"

See Ex. A to Anable Decl. (docket no. 177-1); Exs. 15 & 16 to Kanter Decl. (docket  
nos. 195 & 196); Requests for Admission Nos. 44, 45, 70, & 71, Ex. 14 to Kanter Decl.  
(docket no. 195) (referencing [www.hydroblok.com](http://www.hydroblok.com)). Most of these statements constitute  
puffery, and the remaining statements are not demonstrably false or misleading  
representations of fact.

1           **1.     Puffery**

2           Whether a statement is one of fact or mere puffery is a legal question that may be  
3 resolved on a dispositive motion. See Newcal Indus., 513 F.3d at 1053; see also Cook,  
4 Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911 F.2d 242, 245 (9th Cir. 1990).

5 Puffery consists of generalized statements that do not make specific claims and that are  
6 unlikely to induce consumer reliance. See Newcal Indus., 513 F.3d at 1053; see also  
7 Babb v. Regal Marine Indus., Inc., 2014 WL 690154 at \*3 & n.4 (Wash. Ct. App.  
8 Feb. 20, 2014) (indicating that puffery is not actionable under the CPA), remanded on  
9 other grounds, 180 Wn.2d 1021, 329 P.3d 67 (2014). Puffery has at least two forms:

10 (i) exaggerated, blustering, and/or boastful statements on which no reasonable buyer  
11 would be justified in relying; and (ii) general claims of superiority over comparable  
12 products that are so vague they cannot be understood as anything more than mere  
13 opinions. See Pizza Hut, Inc. v. Papa John's Int'l, Inc., 227 F.3d 489, 497 (5th Cir.  
14 2000).

15           Examples of the first type of puffery include (i) a lens manufacturer's touting that  
16 it uses "the most advanced equipment available," see LensCrafters, Inc. v. Vision World,  
17 Inc., 943 F. Supp. 1481, 1498 (D. Minn. 1996); (ii) a cellular phone company bragging  
18 that it has "the best technology," see Cook, 911 F.2d at 246 (citing Metro Mobile CTS,  
19 Inc. v. NewVector Commc'ns, Inc., 643 F. Supp. 1289 (D. Ariz.), rev'd on other grounds,  
20 803 F.2d 724 (9th Cir. 1986)); (iii) a copier leasing company's promise to deliver  
21 "flexibility" in its "'cost-per-copy' contracts," as well as "lower copying costs," Newcal  
22 Indus., 513 F.3d at 1052-53; and (iv) a razor seller's statement that its cartridges "have a

1 patented blade coating for incredible comfort,” Edmundson v. Procter & Gamble Co.,  
2 537 Fed. App’x 708, 709 (9th Cir. 2013). Within the second category of puffery are  
3 (i) slogans like Papa John’s “Better Ingredients. Better Pizza.,” Pizza Hut, 227 F.3d at  
4 499; and (ii) a debt collector’s advertisement suggesting that, if “you pay for an attorney  
5 to do your collection work” and “find that you are doing all the ‘leg work’ for your  
6 lawyer,” then “call us – we’re the low cost commercial collection experts,” Cook, 911  
7 F.2d at 243, 246.

8 **a. Exaggerated, Blustering, and/or Boastful Ads**

9 In this matter, the statements that wedi has numbered ii, iii, ix, and x, see Pla.’s  
10 Resp. at 2-3 (docket no. 187), are the kind of exaggerated, blustering, and/or boastful  
11 remarks constituting “puffery” on which a purchaser cannot reasonably rely. The terms  
12 “dust free and quick,” “environmentally friendly,” “maximum adhesion,” and  
13 “commercially rated” do not have the requisite specificity to be actionable under the  
14 Lanham Act or the CPA. The process of cutting most materials produces some dust or  
15 debris and takes some time, and the phrase “dust free and quick” must be understood as a  
16 relative description.<sup>3</sup> Similarly, “environmentally friendly” implies a comparison, as  
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18 <sup>3</sup> In support of its contention that cutting HYDRO-BLOK™ produces dust, wedi cited (i) a Safety  
19 Data Sheet for Polyfoam - Extruded Polystyrene Foam (“XPS”), Ex. 37 to Kanter Decl. (docket  
20 no. 197); (ii) a YouTube link, see Kanter Decl. at ¶ 13 (docket no. 194); and (iii) the declarations  
21 of Ian Guiberson, docket no. 190, and Herbert Oxenrider, docket no. 188, which have both been  
22 stricken, see Minute Order at ¶ 3 (docket no. 240). The XPS Safety Data Sheet does not itself  
23 establish that cutting HYDRO-BLOK™ generates dust, but rather indicates that “[d]ust particles  
from cutting [XPS] are unlikely to be of inhalable dimensions unless power tools are used.”  
Ex. 37 to Kanter Decl. (docket no. 197). One of the advantages touted about HYDRO-BLOK™  
is that it can be “easily cut” with a utility knife or hand saw, see Ex. A to Anable Decl. (docket  
no. 177-1), instead of a power tool, and thus, the “dust free” claim is entirely consistent with the

1 opposed to a promise to have no negative impact on the ecosystem. Finally, contrary to  
2 wedi's contention, "maximum adhesion" and "commercially rated" are not characteristics  
3 that can be measured or tested, and therefore, do not support a false advertising claim.<sup>4</sup>  
4 Compare *Smith-Victor Corp. v. Sylvania Elec. Prods., Inc.*, 242 F. Supp. 302, 308-09  
5 (N.D. Ill. 1965) (distinguishing between the statements "far brighter than any lamp ever  
6 before offered for home movies" and "the beam floods an area greater than the coverage  
7 of the widest wide angle lens," which both constitute puffery, and the promises of  
8 "35,000 candlepower" and a "10-hour life," which could give rise to liability if untrue).

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11  
12 XPS Safety Data Sheet. The Court has not considered the YouTube video, which was cited as  
"available," but not properly made part of the record in this matter.

13 <sup>4</sup> According to wedi, the term "commercially rated" is understood within the industry to mean  
14 that the product has been tested using American Society for Testing and Materials ("ASTM")  
method C627 (the "Robinson Floor Test"). See Lohmann Decl. at ¶ 5 (docket no. 187-1).  
15 H-International has admitted that HYDRO-BLOK products have never been tested using  
ASTM C627. See Request for Admission No. 118, Ex. 14 to Kanter Decl. (docket no. 195).  
16 The advertising statement at issue, however, makes no assertion that HYDRO-BLOK products  
have passed ASTM C627 or that they have withstood a particular number of cycles of the test,  
17 and it does not include the quantified rating language adopted by the Tile Council of North  
America ("TCNA"), namely "light" (passes cycles 1-6), "moderate" (passes cycles 1-10),  
"heavy" (passes cycles 1-12), or "extra heavy" (passes cycles 1-14) commercial use. See Bill  
18 Griese, *Here's to you, Mr. Robinson*, TILE MAGAZINE 32, 34 (July/Aug. 2009) (<https://www.tcnatile.com/images/pdfs/Here's%20to%20you,%20Mr.%20Robinson.pdf>); see also Lohmann  
Decl. at ¶ 6 (docket no. 187-1) (indicating that the TCNA might now have seven categories of  
19 commercial ratings, but providing no further details). wedi has offered no evidence that a  
purchaser versed in the relevant terminology would be misled by the general verbiage  
20 "commercially rated," as opposed to specific warranties like those contained in competitors'  
information sheets, for example: (i) "ASTM C-627 Residential & Light Commercial," FinPan  
21 ProPanel® Installation Details, Ex. 4 to Kanter Decl. (docket no. 195 at 39); (ii) "ASTM C627  
RATED EXTRA HEAVY," Laticrete HYDRO BAN Sheet Membrane, Ex. 4 to Kanter Decl.  
22 (docket no. 195 at 42); and (iii) "Passes cycles 1-6 | C627 | Residential," USG Durock™ Brand  
UltraLight Foam Tile Backerboard Submittal Sheet, Ex. 4 to Kanter Decl. (docket no. 195 at 54).

1                   **b.     General Claims of Superiority**

2           The statements enumerated by wedi as v, vi, vii, viii, and ix, see Pla.’s Resp. at 2-3  
3 (docket no. 187), are non-actionable opinions of superiority over comparable products.  
4 These statements describe HYDRO-BLOK™ as the easier/easiest, quicker/quickest, more  
5 cost-effective, most user-friendly, most efficient, or better product. Such vague and  
6 general comments fall squarely within the definition of “puffery.” wedi does not contend  
7 that specific comparisons were made to wedi’s products, their components, or their  
8 performance, and it has offered no evidence that might transform these general opinions  
9 into quantifiably false or misleading statements of fact. Compare Pizza Hut, 227 F.3d at  
10 500-01 (concluding that, because ads compared specific ingredients used by Papa John’s  
11 with ingredients used by its competitors, while the evidence established that Papa John’s  
12 and Pizza Hut’s sauces and doughs had no demonstrable differences, the record  
13 supported the jury’s finding that the related slogan “Better Ingredients. Better Pizza.”  
14 was misleading).

15                   **2.     Falsity**

16           wedi alleges that the statements “All HYDRO-BLOK™ products are IAPMO  
17 tested & certified” and “HCFC-FREE XPS” are both literally false. wedi’s accusations  
18 lack merit.

19                   **a.     IAPMO Certification**

20           The International Association of Plumbing and Mechanical Officials (“IAPMO”)  
21 issued a Certificate of Listing for HYDRO-BLOK tileable shower receptors and shower  
22 kits for the following years: (i) March 2015 – March 2016, Ex. B to Anable Decl.  
23

1 (docket no. 177-2); (ii) March 2016 – March 2017, Ex. C to Anable Decl. (docket  
2 no. 177-3); (iii) March 2017 – March 2018, Ex. D to Anable Decl. (docket no. 177-4);  
3 and (iv) March 2018 – March 2019, Ex. E to Anable Decl. (docket no. 177-5).<sup>5</sup> Each  
4 Certificate of Listing indicates that IAPMO Research and Testing, Inc. (“IAPMO R&T”)  
5 is a product certification body, which

6 tests and inspects samples taken from the supplier’s stock or from the  
7 market or a combination of both to verify compliance to the requirements  
8 of applicable codes and standards. This activity is coupled with periodic  
surveillance of the supplier’s factory and warehouses as well as the  
assessment of the supplier’s Quality Assurance System.

9 Exs. B-E to Anable Decl. (docket nos. 177-2 – 177-5). Thus, wedi cannot show that,  
10 from March 2015 until March 2019, the representation that “HYDRO-BLOK™ products  
11 are IAPMO tested & certified” was literally false.

12 wedi contends, however, that the “IAPMO tested & certified” slogan was used  
13 prematurely, before March 2015, as well as in a misleading fashion throughout the four-  
14 year period at issue because the product changed after it was tested by IAPMO R&T in  
15 2014. With regard to the first argument, the undisputed evidence establishes that,  
16 although a brochure posted on the website on January 12, 2015, mentioned IAPMO  
17 certification before such status was official, the reference was removed from the brochure  
18 and the website by January 22, 2015, in advance of any HYDRO-BLOK products landing  
19

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20 <sup>5</sup> wedi appears to raise an evidentiary objection to the Certificates of Listing, arguing that they  
21 constitute hearsay and cannot be used against wedi because wedi has not manifested that it has  
22 adopted them. *See* Pla.’s Supp. Resp. at 3 n.4 (docket no. 242) (citing Fed. R. Evid. 801(d)(2) &  
23 802). The Certificates of Listing, however, fall within at least two exceptions to the rule against  
hearsay, namely as business records and as market reports “generally relied on by the public or  
by persons in particular occupations.” *See* Fed. R. Evid. 803(6) & (17).



1 in the United States (from China) and being available for sale. See Ex. D to Koch Decl.  
2 (docket no. 252-4); see also Ex. B to Anable Decl. (docket no. 205-2 at 4) (indicating that  
3 HYDRO-BLOK products were first offered for sale in February 2015 and were first  
4 imported and sold in May 2015); Koch Dep. at 159:20-25, Ex. 1 to Kanter Decl. (docket  
5 no. 243-1). Thus, wedi cannot, for purposes of its false advertising claims, establish the  
6 requisite deception of or tendency to deceive purchasers, or any diversion of sales or  
7 other injury, associated with announcing IAPMO certification too soon. See supra notes  
8 1 & 2.

9 As to wedi's assertion that IAPMO certification was either obtained or maintained  
10 improperly, wedi has not offered the type of evidence necessary to prove such claim.

11 The Listing Agreement between IAPMO R&T and H-International ("Listee") indicates  
12 that

13 Listee shall make no substantial change in material, manufacturing process,  
14 marking or design of the product without prior written approval of the  
15 Product Certification Committee . . . . [T]he term "substantial change"  
16 means any change which would make any of the information set forth on  
17 the Certificate of Listing or the Classified Marking License for the product  
18 false or misleading (or which would reasonably be deemed to cause the  
19 product to fail to conform to the applicable standard(s) for the product  
20 and/or the applicable code(s) set forth in the Certificate of Listing, or to fail  
21 to conform to the applicable standard(s) for the product set forth in the  
22 Classified Marking License).

23 Listing Agr. at ¶ 14, Ex. 24 to Kanter Decl. (docket no. 196). Although wedi has  
provided evidence that the manufacturer of HYDRO-BLOK products experienced certain  
quality control issues and made some adjustments by employing different equipment  
and/or components, wedi has offered no proof that any modifications resulted in a  
"substantial change" within the meaning of the Listing Agreement, and has failed to

1 explain how reasonable jurors could find the requisite “substantial change” in the absence  
2 of expert testimony to assist them. In contrast, Ken Koch has testified that no changes  
3 have been made to the manufacturing process or materials since the production run in  
4 2014 that generated the samples sent to IAPMO R&T for testing and certification. See  
5 Koch Dep. at 307:14-309:12, Ex. A to Denkenberger Decl. (docket no. 250-1); see also  
6 Koch Dep. at 291:8-12, Ex. 1 to Kanter Decl. (docket no. 243-1).

7 wedi attempts to counter Koch’s representation about the lack of any material  
8 modification to the product by pointing out that IAPMO R&T’s testing was performed in  
9 February and March 2014, see Ex. A to Koch Decl. (docket no. 252-1), and March  
10 through June 2014, see Ex. 7 to Kanter Decl. (docket no. 243-7), but the product was first  
11 manufactured in March 2015, Ex. B to Anable Decl. (docket no. 205-2 at 4). wedi’s  
12 argument is non-sensical. IAPMO certification was required before the product could be  
13 placed on the market and, by definition, all testing had to precede commercial production.  
14 wedi provides no authority to support the proposition that a prototype could not serve as  
15 an appropriate sample for testing.

16 wedi also tries to cast doubt on Koch’s veracity by asserting that the product tested  
17 by IAPMO R&T had a blue core, while the HYDRO-BLOK products generally have  
18 green cores. wedi cites to a photograph, taken against a blue background, that was  
19 included in an unsigned, undated, draft report. See Fig. 1, on the next page. The draft  
20 report does not mention the color of any items that were tested, and wedi offers no  
21 evidence that the photograph accurately reflects the color of the core, no evidence that the  
22  
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1 core of the sample was not in fact green, and no evidence that the color of the core was  
2 material to its performance or ability to satisfy the applicable standards and codes.



Fig. 1: from China IAPMO  
R&T Lab - Test Data Sheet (draft),  
Ex. 7 to Kanter Supp. Decl.  
(docket no. 243-7).

13 HYDRO-BLOK™ brochures currently indicate that the product is tested and  
14 certified by ICC Evaluation Service, a subsidiary of the International Code Council. See  
15 Ex. B to Fogarty Decl. (docket no. 244-2). The brochures no longer refer to IAPMO.  
16 See Koch Dep. at 294:25-295:17, Ex. A to Denkenberger Decl. (docket no. 250-1). wedi,  
17 however, raises the same complaint about ICC certification that it made about IAPMO  
18 certification, arguing that, because ICC Evaluation Service did not independently test the  
19 HYDRO-BLOK products, but instead relied on IAPMO R&T's reports, see Koch Dep. at  
20 299:25-301:5, Ex. 1 to Kanter Decl. (docket no. 243-1), the certification does not relate to  
21 products currently on the market, and any statements about ICC certification are literally  
22 false. For the reasons outlined earlier, wedi's allegation of literal falsity lacks merit, as  
23

1 does any suggestion that a representation about a certification actually issued is somehow  
2 misleading. wedi's dissatisfaction with the process for certifying HYDRO-BLOK  
3 products is more appropriately raised with ICC Evaluation Service or the ICC. *See* Ex. B  
4 to Denkenberger Decl. (docket no. 250-2 at 5) (email from ICC Evaluation Service's  
5 Director of Standards, who used to work for IAPMO, indicating that the procedure for  
6 challenging a certification is to submit a complaint to the product review committee and  
7 provide data showing that the product being produced is not the same as the product that  
8 was tested). wedi's challenge to the method by which certification was granted does not  
9 form a basis for a false advertising claim under the Lanham Act or the CPA.

10 **b. HCFC-FREE XPS**

11 wedi relies on three documents as support for the allegation that "HCFC-FREE  
12 XPS" is literally false, namely (i) the Safety Data Sheet from FUDA Thermal Insulation  
13 Material Co., Ltd. concerning Extruded Polystyrene Foam ("XPS"), Ex. 37 to Kanter  
14 Decl. (docket no. 197); (ii) an email from Ken Koch indicating that the HYDRO-BLOK  
15 products contain HBCD, a fire-retardant banned in Canada, but not in the United States,  
16 Ex. 39 to Kanter Decl. (docket no. 197); and (iii) a test report from SGS Hong Kong Ltd.  
17 ("SGS"), which was summarized in the transmittal email as reflecting that the foam used  
18 in HYDRO-BLOK products is "CFC and HCFC free," Ex. 38 to Kanter Decl. (docket  
19 no. 198). The first two items do not concern HCFC, which wedi has not defined other  
20 than to associate it with the depletion of the Earth's ozone layer. *See* Pla.'s Resp. at 4-5  
21 (docket no. 187). The acronym HCFC presumably stands for hydrochlorofluorocarbons,  
22 which (as the term suggests) are substances composed of hydrogen, chlorine, fluorine,  
23

1 and carbon. HBCD or hexabromocyclododecane, on the other hand, contains bromine  
2 and no chlorine or fluorine, and it is not an HCFC. Thus, the presence of HBCD in the  
3 HYDRO-BLOK product does not make the statement “HCFC-FREE XPS” false or  
4 misleading, and wedi has not identified any representation concerning HBCD that might  
5 form the basis of a false advertising claim.

6 The third exhibit on which wedi relies, the SGS Test Report dated September 23,  
7 2015, Ex. 38 to Kanter Decl. (docket no. 197), does not bolster, but rather undermines  
8 wedi’s accusation that “HCFC-FREE” is a false description of the XPS incorporated in  
9 HYDRO-BLOK products. In the Result Summary portion of the Test Report, next to the  
10 phrase “Ozone Depleting Substances,” the conclusion set forth is “--.” *Id.* (docket  
11 no. 197 at 42). Of the 62 chlorofluorocarbons (“CFCs”) and HCFCs for which tests were  
12 performed, SGS reported results of “not detected” for all but two compounds, namely  
13 HCFC-22, which had a level of 1.0 µg/g, and HCFC-142b, which had a level of 7.3 µg/g.  
14 *Id.* (docket no. 197 at 43). Although these levels are above the detection limit of  
15 0.1 µg/g, they are nominal amounts, and SGS’s conclusion that the XPS at issue had  
16 “--” ozone-depleting substances indicates that the material is essentially “HCFC-free.”  
17 Moreover, the Safety Data Sheet submitted by wedi, and on which Hydro-Blok and  
18 H-International undisputedly could rely, states that FUDA’s XPS is “free of HCFC  
19 blowing agents and complies with EU Regulation EC/1005/2009,” regarding substances  
20 that deplete the ozone layer. Ex. 37 to Kanter Decl. (docket no. 197 at 36).

21 The Court concludes that wedi cannot, as a matter of law, establish a prima facie  
22 case of false advertising, and its Lanham Act and CPA claims are DISMISSED with  
23

1 prejudice. In light of this ruling, the Court need not address whether the CPA claim also  
2 fails for lack of evidence of public interest, causation, and/or injury.

3 **D. Tortious Interference**

4 To establish tortious interference with a contractual relationship or business  
5 expectancy, a plaintiff must prove: (i) the existence of a valid contractual relationship or  
6 business expectancy; (ii) the defendant's knowledge of that relationship; (iii) an  
7 intentional interference inducing or causing a breach or termination of the relationship or  
8 expectancy; (iv) the defendant's interference had an improper purpose or used an  
9 improper means; and (v) resultant damage. *Leingang v. Pierce Cty. Med. Bureau, Inc.*,  
10 131 Wn.2d 133, 157, 930 P.2d 288 (1997). Wright, Hydro-Blok, and H-International  
11 previously moved for summary judgment, on the basis of collateral estoppel (also known  
12 as issue preclusion), as to wedi's tortious interference with contract claim against H-  
13 International and wedi's tortious interference with prospective economic advantage claim  
14 against all three entities, but they failed to show "with clarity and certainty" how the  
15 arbitrator's decision concerning wedi's breach of contract, breach of fiduciary duty, civil  
16 conspiracy, unjust enrichment, and WUTSA claims against Wright and/or Sound Product  
17 preempted wedi's tortious interference claims. *See* Order at 6 (docket no. 152). In the  
18 current motion for summary judgment, the moving parties again attempt to rely on the  
19 arbitral award as a basis for dismissing wedi's tortious interference claims. The Court  
20 remains unpersuaded that the arbitrator's findings preclude wedi from pursuing its  
21 tortious interference claims.  
22  
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1 Wright undisputedly shared with Koch (H-International) certain confidential  
2 information he acquired while serving as a sales agent for wedi, including financial data  
3 and customer lists. See Exs. 2-6 & 8-9 to Kanter Decl. (docket no. 195). wedi alleges  
4 that, in doing so, Wright, along with Hydro-Blok and H-International, used “improper  
5 means” to interfere with wedi’s contractual relationships or business expectancies,  
6 resulting in damage to wedi. In a supplemental response filed at the Court’s direction,  
7 wedi identifies the following items of damage: (i) the loss of customers; (ii) \$40,000 in  
8 rebates that wedi has issued to one of its distributors; (iii) Wright’s, Hydro-Blok’s, and  
9 H-International’s improper acquisition from wedi of a Hilton “lead” list worth \$5,000;  
10 (iv) Wright’s, Hydro-Blok’s, and H-International’s improper acquisition from wedi of  
11 legal advice, for which wedi paid \$1,500, concerning the potential liability of  
12 independent contractors; and (v) injury to reputation or goodwill.<sup>6</sup> See Pla.’s Supp. Resp.  
13 at 9-10 (docket no. 242); see also Lohmann Decl. at ¶¶ 9-11, 15-16 (docket no. 187-1).  
14 The Court concludes that wedi has presented triable issues relating to its tortious  
15 interference claims and that, as a result, summary judgment cannot be granted.

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20 <sup>6</sup> See Mut. of Enumclaw Ins. Co. v. Gregg Roofing, Inc., 178 Wn. App. 702, 714 & n.2, 315 P.3d  
21 1143 (2013) (on a tortious interference claim, corporations may recover for injury to reputation,  
22 but not emotional distress); see also Experience Hendrix, L.L.C. v. HendrixLicensing.com, Ltd.,  
23 2011 WL 4402775 at \*5 (W.D. Wash. Sep. 21, 2011) (under Washington law, business  
reputation and goodwill are synonymous), rev’d in part on other grounds, 762 F.3d 829 (9th Cir.  
2014).

**Conclusion**

For the foregoing reasons, the Court ORDERS:

(1) The motion for summary judgment, docket no. 176, brought by Wright, Sound Product, Hydro-Blok, and H-International is GRANTED in part and DENIED in part as follows: (i) the motion is GRANTED as to wedi's abuse of process, Lanham Act, and CPA claims, counterclaims, and/or counter-counterclaims, which are DISMISSED with prejudice; and (ii) the motion is otherwise DENIED. The matters remaining for trial are summarized below:

<b>Claim and/or Counterclaim</b>	<b>Asserted By</b>	<b>Against</b>
Tortious Interference with Contract	wedi	H-International
Tortious Interference with Prospective Advantage	wedi	Wright, Hydro-Blok, and H-International
Tortious Interference with Prospective Advantage	Wright, Hydro-Blok, and Sound Product	wedi
Abuse of Process	Wright, Hydro-Blok, and Sound Product	wedi

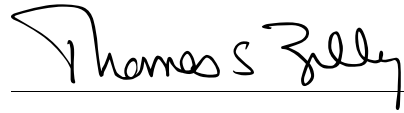
(2) The parties are DIRECTED to file a Joint Status Report within fourteen (14) days of the date of this Order setting forth a proposed trial date and any scheduling conflicts within the three-month period surrounding such date.

(3) The Clerk is DIRECTED to send a copy of this Order to all counsel of record.



1 IT IS SO ORDERED.

2 Dated this 18th day of June, 2019.

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5 Thomas S. Zilly  
6 United States District Judge  
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